No. 10-521

In The Supreme Court of the United States

BOARD OF COUNTY COMMISSIONERS
OF BOULDER COUNTY, COLORADO,

Petitioner,

v.

ROCKY MOUNTAIN CHRISTIAN CHURCH, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF COLORADO CHAPTER OF THE AMERICAN PLANNING ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF THE *AMICUS CURIAE*[1]

The Colorado Chapter of the American Planning Association ("APA-CO") submits this brief *amicus curiae* in support of Petitioner, the Board of County Commissioners of Boulder County ("Petitioner").

APA-CO is a chapter of the American Planning Association, a nonprofit public interest and research organization whose mission is to encourage planning that will contribute to the public well-being by developing communities and environments that more effectively meet the present and future needs of people and society. APA-CO represents approximately 1,500 professional planners, planning officials and citizen planners involved in urban and rural planning activities in their communities. They are involved on a day-to-day basis in formulating policies and regulations to address growth and development in their communities, as well as implementing adopted policies and regulations. http://www.apacolorado.org/

Planning and development review is always a balancing act for which the local government is uniquely qualified. Not only does the decision of the

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[1] Counsel for the parties did not author this brief in whole or in part. No person or entity other than the *amicus* made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received notice from the *amicus* of its intention to file an *amicus curiae* brief at least 10 days prior to the due date for the brief. Consent was granted by all parties to the filing of this brief.

Tenth Circuit promote preferential treatment for religious institutions at the expense of the local planning process, it substitutes the Court's judgment for that of the local government. If left to stand, the decision will have significant negative repercussions on the future of land use and community planning within the Tenth Circuit and, possibly, other circuits that look to their sister circuits for guidance.

The question presented involves whether the Equal Terms and Unreasonable Limitations provisions of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc(b)(1) and (b)(3)(B), expand the scope of legal protection granted to religious exercise beyond that established by the First Amendment in violation of the Establishment Clause and Section 5 of the Fourteenth Amendment.

STATEMENT OF THE CASE

Amicus adopts the statement of the case and facts as presented by Petitioner, Board of County Commissioners of Boulder County, Colorado.

SUMMARY OF ARGUMENT

Community planning requires balancing the present and future needs and goals of the community in an open and public process. Once adopted, the

community's formal land use plan (the "Comprehensive Plan") represents the culmination of a deliberative process to balance many competing interests. Development regulations and the review of applications for development must be consistent with and guided by the adopted Comprehensive Plan. The Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") (42 U.S.C. §§ 2000cc et seq.) is problematic and this case clearly illustrates the problem. The practical effect of the Tenth Circuit's decision is to elevate the interests of religious land use applicants above the interests of other development applicants, above the interests of neighbors, and above the interests of the general community-as-a-whole – an anathema to the basic principles of the planning profession; thus putting planners and the local governments they serve in an untenable position.

Following a ten day trial, the jury found Boulder County's partial denial of a special use permit application from the Rocky Mountain Christian Church (the "Church") was *not unconstitutional, nor motivated by religious discrimination*, but also concluded that the denial violated RLUIPA's Equal Terms, Unreasonable Limitation, and Substantial Burden provisions. App. 4 RLUIPA was intended to protect religious exercise from substantially burdensome, discriminatory or irrational land use regulations. Instead of protecting the Church from hostile government action as intended by Congress, the District Court and the Tenth Circuit have granted the Church an extraordinary special privilege not extended to other

property owners and not required under RLUIPA – the right to overrule the community's Comprehensive Plan.

REASONS FOR GRANTING THE WRIT

A. The Tenth Circuit's interpretation of RLUIPA's Equal Terms and Unreasonable Limitations provisions undercuts the careful balancing of competing interests established through the community planning process and the Boulder County Comprehensive Plan.

Planning is often misunderstood and unappreciated, but it is an extremely important function of local government which is at the very heart of this case.

In a democratic society, the residents of the community express their goals for the future in two ways – by participating in a public planning process which culminates in an adopted Comprehensive Plan, and by electing representatives to implement that plan. Local officials implement the community's plan day-by-day when they, among other things, approve the capital infrastructure budget, when they adopt land use regulations such as zoning and subdivision ordinances, and when they approve or reject development applications. Connecting development and land use decisions to the adopted Comprehensive Plan is the best way to achieve the community's

goals, or at least to increase the odds that the community's goals will be achieved.

The consequences of failing to plan or failing to implement the Comprehensive Plan can be serious. The challenges and opportunities confronting communities are more difficult and complex today than they have ever been. Professor John R. Nolon from Pace University School of Law notes that in just 35 years,[2]

> the nation's population will grow by 100 million people: an increase of 33%. The private sector will produce for these new Americans over 70 million homes and over 100 billion square feet of offices, stores, factories, institutions, hotels, and resorts. Researchers predict that two-thirds of the structures in existence in 2050 will be built between now and then.
>
> This growth cannot proceed randomly without great cost to the economy, environment, and public health. This is neither an ideological nor a political issue. The consequences of haphazard development are not popular with the vast majority of Americans. They complain about the results of current growth patterns: an increase of asthma and obesity among the young, traffic congestion that stalls commuters, insufficient housing for the

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[2] John R. Nolon, *The Future of Our Land: Presidential Leadership*, 60 PLAN & ENVTL. LAW 1 at pp. 4-5 (2008).

> workforce and the elderly, the decline of cities as economic and cultural centers, threats to drinking water quality and quantity, reduced habitats and wetlands, higher incidences of flooding, rampant fossil fuel consumption, and an ever larger carbon footprint.

Id.

Communities prepare and adopt the Comprehensive Plan to address these serious challenges; to strive towards the goals expressed by the community's residents; and to balance the competing interests in a fair and democratic fashion. The general public certainly expects that the goals and policies of the plan will be successfully implemented, as evidenced by the countless hours, days, and weeks they volunteer to engage in the community's planning process.

There are a number of reasons why the community's Comprehensive Plan must be successfully implemented.

• Planning should not be an exercise in futility. Certainly, state legislators would never enact legislation or delegate planning authority which is ineffectual, or without a meaningful purpose. Colorado's planning legislation requires Boulder County to engage in a community planning process, and to prepare and adopt a Comprehensive Plan, also known as a Master Plan. *See* § 30-28-106, Colo. Rev. Stat. (2010). Colorado law also permits counties to require land use decisions conform to the Comprehensive

Plan. § 30-28-106(3)(a), Colo. Rev. Stat. In fact, one of the criteria which Boulder County applies to all applicants for a special use permit is whether the proposed development is in accordance with the Comprehensive Plan. App. 5.

• Some serious community growth and development challenges require that a longer view be taken. Implementing the goals and policies in the Comprehensive Plan provides better odds that community leaders are taking the longer view, rather than succumbing to short-term community pressure and shooting from the hip. Boulder County's Comprehensive Plan has been in place for more than thirty years. App. 4.

• In a democratic society, the public participates in setting the goals for the future. A Comprehensive Plan that is preceded by a meaningful public planning process, as was the case in Boulder County (A. 4892-94; 4018-19; 4572:12-20), presumably represents the desires of the community's residents and the inevitable competing interests have been heard and reconciled in that process.

• Successful implementation of the provisions of the Comprehensive Plan engenders greater public trust and confidence in the local land use decision-making process. "One of the greatest failings of contemporary zoning law," a land use law commentator notes, "has been the vulnerability of the system to influence by politically powerful individuals, a vulnerability that can only be overcome by establishing a procedural

and substantive framework for individual decisions – planning."[3]

- The general public, property owners, and developers have a desire as well as an expectation for a reasonable degree of certainty, stability and predictability in the land use regulatory regime. Linking development and land use decisions to an adopted Comprehensive Plan not only implements the plan, but also provides a measure of stability to the zoning game[4] and helps avoid incremental, *ad hoc* decision-making disconnected from the plan.[5]

- Perhaps most importantly from the perspective of the local government, connecting its land use decisions to the Comprehensive Plan provides further evidence that the decisions are rational and reasonable.

Since 1978, Boulder County's Comprehensive Plan has directed development into municipalities

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[3] Charles L. Siemon, *The Paradox of "In Accordance With a Comprehensive Plan" and Post Hoc Rationalizations: The Need for Efficient and Effective Judicial Review of Land Use Regulations*, 16 STETSON L. REV. 603, 627 (1987).

[4] Richard Babcock, THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES 120-21 (1966).

[5] Charles Siemon notes that "[i]n the absence of planning policies adopted in the abstract as a part of a serious planning effort, individual land use decisions become nothing more than ad hoc judgments influenced by the heat of the moment ('a decision based on . . . impulse, prejudice, or just plain fatigue . . . '), what has been sarcastically described as the 'mockery of ad hockery.'" *See*, note 3 *supra*. [Siemon quoting Babcock & Siemon, THE ZONING GAME REVISITED (1985) at 262.]

where urban services are available; and implemented policies to protect natural resources from loss. *See* App. 4. Boulder County's Comprehensive Plan is based on a community consensus about the importance of agricultural and open space preservation.

> Boulder County, Colorado, has a tradition of exemplary nationally recognized planning and effective implementation going back 30 years. Much has been written about the county's active citizens and their involvement in the development of the Comprehensive Plan, the passage of several tax measures to pay for open space, and the support of the intergovernmental agreements that define the urban growth boundaries of all the municipalities in the county.
>
> The Boulder County Comprehensive Plan's goals and policies detail an extraordinary vision, and framework, for the conservation and preservation of this special place including the agricultural, forestry, environmental, and rural characteristics of the largely undeveloped areas outside of the city limits, and the development of core area with supportive infrastructure and urban densities.
>
> Over the years there have been many requests for development that would have adversely impacted the preservation of these rural landscape values. All have been rejected in favor of more appropriate development. Traditional subdivisions are not permitted. The minimum lot size for most of the county is 35 acres. Cluster development and receiving

> sites for transfer of development rights are the only subdivisions allowed. The Comprehensive Plan and the land use code direct urban uses to the cities.
>
> It is not that some development is good and some is bad. What Boulder County has done is to make sure that the right development is in the right place. The U.S. Supreme Court in its very first decision on zoning in 1926 set down this bedrock principle in the earthiest of terms: 'A nuisance may be merely a right thing in the wrong place – like a pig in the parlor instead of the barnyard.' *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388. A working farm with its dust, noise, and sometimes noxious odors should not be allowed in the central business district, and multifamily housing or high-rise office buildings have no place in the country.[6]

Boulder County has rigorously enforced its Comprehensive Plan policies through the Land Use Code and special use review process. *See* A. 4904:10-4905:22; 4095:1-4; 5011:11-18, and 4095:1-16. The special use process requires county officials to determine that the requested development will not adversely affect surrounding uses, require additional services or infrastructure, nor deplete natural resources such as agriculture and open space conversion. A. 6965.

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[6] Daniel Dalton, Graham S. Billingsley, and Dwight H. Merriam, *RLUIPA: Two Sides of the Story*, 59 PLAN & ENVTL. LAW 4 at pp. 6-7 (2007).

Special use review is a quintessentially local government process, requiring knowledge of local conditions and policies.

Boulder County's Land Use Code establishes triggers or thresholds for the larger, more impacting uses, and it does not matter if it is a church, or a resort lodge, or a private school. A. 4016-17. If due to its scale and character, a proposed use may have an adverse impact on an area, then a special use review is required. *Id.* In the present case, the District Court found that Boulder County's special use regulations are neutral and generally applicable. A. 2529-20; 5234; 5239.

Planners and county officials must evaluate any application for development in light of the goals and policies contained in the community's Comprehensive Plan. In addition to implementing the goals, the role of planners and the local governments they serve is to preserve, protect, and promote the public's health, safety, and general welfare – the familiar police power mandate. The public includes all citizens like parishioners of religious institutions seeking development approval for religious facilities, and those who do not want such facilities built in certain areas due to established community goals. As with most every application for development, there were competing interests at stake in this case when the church submitted its expansion request and these interests were fairly considered during the public hearings and deliberations on the special use application. *See*

A. 4090:2-17; 6810; 4784:1-6; 4093-94; 4092:1-12; 5101-03; 5578-84.

Some commentators believe that RLUIPA has leveled the land use playing field,[7] but that may only be true where discriminatory actions have been found. Such is not the case in Boulder County where every special use application from a religious institution has been approved. App. 16. Rather, RLUIPA has tilted the playing field in favor of the religious land use applicant, and against the community, at least when it results in Equal Terms and Unreasonable Limitations violations while at the same time, under the very same facts, there is no finding of discrimination. Under these circumstances, RLUIPA makes implementation of Boulder County's Comprehensive Plan as a practical matter impossible, and elevates the Church's goals over the community's goals.

After a ten day trial, the jury found that Boulder County officials did not discriminate against the Church based on religion, viewpoint, or association when they denied the Church's 2004 application. A. 3108-111. Nevertheless, according to the Tenth Circuit, Boulder County's decision violated RLUIPA's Equal Terms and Unreasonable Limitations provisions. App. 15 and 17.

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[7] Daniel P. Dalton, *Defining "Appropriate Relief" Under the Religious Land Use and Institutionalized Persons Act: The Availability of Damages and Injunctive Relief with RLUIPA*, 2 ALBANY GOV'T L. R. 604 (2009).

B. The U.S. Constitution requires planners and local appointed and elected officials to navigate carefully between the Free Exercise Clause and the Establishment Clause.

> *"Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof . . . "*

U.S. Const. Amend. I

The tension between these two religion clauses in the land use context has not been clearly addressed by this Court. The challenge for religious land use regulations and religious land use applications is that the government must steer between the two poles of constitutional limitation. Government must accommodate religious facilities, but if it is too accommodating, it will be accused of establishing religion.[8]

In the present case, the jury found that Boulder County officials had successfully navigated between the two religion clauses, but the county was nevertheless ordered to pay more than $1.2 million in attorneys' fees. A. 3336-38.

Planners and local government officials are cautioned to provide reasonable options for locating new, or expanding, houses of worship and accessory religious uses such as schools; to examine whether they have adequate locations for "social service" uses

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[8] Susan L. Trevarthen, *Best Practices in First Amendment Land Use Regulations*, 61 PLAN & ENVTL. LAW 6 at p. 7 (2009).

which both secular and religious groups often provide such as shelters for the homeless or victims of domestic abuse and facilities to feed the homeless and indigent; to review the procedural requirements of their land use regulations to ensure that they are administered fairly and in a nondiscriminatory manner as applied to religious institutions; and even to arrange for "sensitivity training" for themselves and other appropriate public employees to enhance their awareness of religious differences and the need to provide equal treatment to all religious adherents and institutions.[9]

In the present case, Boulder County provided multiple options for the Church to engage in religious exercise. Boulder County did not place limits on the Church's use of existing space. A. 4078:3-19. In addition to three Sunday services that attract over 2000 people, the Church operates a 380-student school and provides daycare, adult education, support groups, camps, pageants, basketball, cheerleading, choirs and much more. A. 3403:3-6; 3788:9-11; 5390-99. The Church has also expanded its activities beyond its Boulder campus, starting eleven "partner" churches. A. 3439-40. Moreover, after Boulder County partially denied the Church's expansion plans, the Church

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[9] Alan C. Weinstein, *How to Avoid a "Holy War" – Dealing With Potential RLUIPA Claims*, 60 PLAN & ENVTL. LAW 3 at p. 6 (2008); *see also,* Michael S. Giaimo and Lora A. Lucero, Eds., RLUIPA READER – RELIGIOUS LAND USES, ZONING, AND THE COURTS, APA AND ABA (2009).

launched a second multi-million dollar church facility only twelve miles away. A. 3478:1-4; 3641:4-11. Even with all of these avenues of communication available to the Church, the jury found that Boulder County violated the Unreasonable Limitations provision of RLUIPA.

The message sent by the Tenth Circuit to planners and local governments is: "to avoid paying millions of dollars in attorneys' fees, defer to the demands of the religious land use applicant and ignore the goals and policies in the community's Comprehensive Plan."

To avoid this conundrum – complying with the Free Exercise Clause, but violating RLUIPA's Equal Terms provision – requires planners and local government officials to elevate the interests of the religious land use applicant above those of other development applicants, above the interests of neighbors, and above the interests of the general community-as-a-whole. This is an anathema to the basic principles of the planning profession and puts planners and the local government they serve in an untenable position. RLUIPA's Equal Terms and Unreasonable Limitations provisions, as interpreted by the Tenth Circuit, have elevated the interests of the religious land use applicant over everyone else without taking into consideration the substantial land use planning interests of local governments. Is this not a violation of the Establishment Clause?

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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